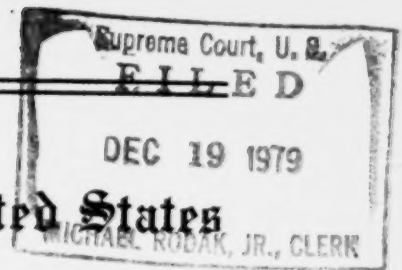

IN THE
Supreme Court of the United States



October Term 1979

No. 79-471

MICHAEL E. STRINGER,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

GEORGE DEUKMEJIAN, Attorney General
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General--
Criminal Division

DANIEL J. KREMER,

Assistant Attorney General

ALAN S. METH, Deputy Attorney General

JAY M. BLOOM, Deputy Attorney General

110 West "A" Street, Suite 700

San Diego, California 92101

Telephone: (714) 237-7750

Attorneys for Respondent

TOPICAL INDEX

	<u>Pages</u>
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2 - 4
STATEMENT OF FACTS	4 - 5
ARGUMENT	5 - 13
I PETITIONER'S CONTENTION REGARDING WHETHER ONE CALIFORNIA OFFENSE IS A LESSER INCLUDED OFFENSE OF ANOTHER CALIFORNIA OFFENSE SIMPLY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION AND THUS DOES NOT WARRANT THE GRANTING OF A WRIT OF CERTIORARI; IN ANY EVENT, IT IS MERITLESS	5 - 11
II THE FACT THAT CALIFORNIA LAW PROHIBITS POSSESSION OF TRACER BULLETS DOES NOT CONSTITUTE A SUB- STANTIAL FEDERAL QUESTION; AND, IN ANY EVENT, CALIFORNIA MAY PROPERLY PROHIBIT POSSESSION OF TRACER BULLETS	11 - 13
CONCLUSION	14
APPENDICES	

TABLE OF AUTHORITIES

	<u>Pages</u>
CASES	
Ferguson v. Skrupa (1963) 372 U.S. 726	12
In re Hess (1955) 45 Cal.2d 171	7,11
In re Johnny V. (1978) 85 Cal.App.3d 120	7
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co. (1978) 439 U.S. 96	12
People v. Anderson (1975) 15 Cal.3d 806	9,11
People v. Drolet (1973) 30 Cal.App.3d 207	12
People v. Westoby (1976) 63 Cal.App.3d 790	8,11
Rice v. Sioux City Cemetery (1955) 349 U.S. 70	6,12
STATUTES	
Health & Safety Code, §§ 12303	<u>passim</u>
12305	<u>passim</u>
Penal Code, §§ 1159	7
12301, subd. (a)(1)	11,12

TABLE OF AUTHORITIES
(Continued)

	<u>Pages</u>
STATUTES	
Penal Code, § 12303.2	<u>passim</u>
RULES OF COURT	
Supreme Court rule 19	6,12

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-471

MICHAEL E. STRINGER
Petitioner,

v.

THE STATE OF CALIFORNIA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The California Court of Appeal, Fourth Appellate District, Division Two, received petitioner's direct appeal from a judgment of conviction. In an unpublished opinion issued on April 23, 1979, in case 4 Crim. 9868, the court found no merit to petitioner's contentions, and affirmed the judgment. (Appen. B.)

JURISDICTION

This Court has jurisdiction to consider the case pursuant to 28 U.S.C. 1257, subdivision 3.

STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix A.

QUESTIONS PRESENTED

1. Whether a substantial federal question is created by petitioner's contentions one offense under California law is not a lesser included offense of another offense under California law.

2. Whether California Health and Safety Code section 12305 describes an offense included within California Penal Code section 12303.2.

3. Whether California's prohibition of tracer ammunition constitutes a substantial federal question and can be deemed improper.

STATEMENT OF THE CASE^{1/}

A three count information charged petitioner in count I with reckless possession of explosives in a private habitation

1. CT refers to the clerk's transcript of the proceedings in the state court. RT refers to the reporter's transcript of the

(Cal. Pen. Code, § 12303.2); in count II with possession of a destructive device (Cal. Pen. Code, § 12303); and in count III with possession of a machine gun (Cal. Pen. Code, § 12220). (CT 1-4.)

Petitioner was arraigned, entered not guilty pleas, and his motion to suppress evidence pursuant to Penal Code section 1538.5, subdivisions (a), (i), was heard and denied. (CT 7, 9-10.)

Petitioner waived trial by jury. (CT 16.) The court found petitioner guilty of unlawful possession of explosives (Cal. Health & Saf. Code, § 12305) as a lesser included offense of the charge in count I. Petitioner was found to be guilty as charged in count I. Petitioner was found to be guilty as charged in count II and was acquitted as to count III. (CT 30.)

Petitioner was placed on probation for five years as to count I. He was fined \$1,000.00 as to count II. (CT 82-84.) He appealed from the judgment (order granting probation). (CT 85.)

The judgment was affirmed by the California Court of Appeal, Fourth Appellate District, Division Two, in an unpublished opinion issued in case 4 Crim. 9868 on April 23, 1979. (Appen. B.)

1. (Continued)

state court proceedings. These transcripts can be lodged with this Court if this Court deems it necessary to the resolution of this case.

A hearing was denied by the California Supreme Court on June 27, 1979. (Appen. C.)

STATEMENT OF FACTS

Glenn Torres was an employee of the United States Forest Service and in 1976 went to a residence located at 1887 Thrush in Wrightwood. (RT 32, 39.) He went there to build a concrete work bench for petitioner in the garage. While at the residence, Torres saw petitioner using the living room and kitchen of the residence. About two weeks later he returned to the residence to get paid for his work. At that time petitioner told him to go into the house and make himself a drink. While at the residence he observed various pillow cases which appeared to contain weapons. He also observed ammunition containers at the residence. (RT 39-51, 58, 67.) Torres visited the residence about 30 times during 1976 and saw petitioner there about 28 times. (RT 61-62.)

On December 14, 1976, Charles Wideen, a deputy sheriff with the San Bernardino County Sheriff's Department, obtained a search warrant for the residence at 1887 Thrush Road. Inside the residence a 50 pound bag of Hercules nitro carbonyl nitrate, a blasting agent, was located. Two coils of safety fuse and two coils of detonating cord were also located in the residence. (RT 74-88.) Boxes of ammunition, as well as two rifles, were also found in the residence. (RT 88-92.)

Inside the garage, the work bench built by Torres was dismantled revealing

rifles, shotguns, pistols, ammunition, holsters, and gun cleaning equipment. Ammunition of various calibers was also located in the garage. (RT 93-98.) It was later determined some of this ammunition was tracer ammunition. (RT 280-283, 390-398.)

ARGUMENT

I

PETITIONER'S CONTENTION REGARDING WHETHER ONE CALIFORNIA OFFENSE IS A LESSER INCLUDED OFFENSE OF ANOTHER CALIFORNIA OFFENSE SIMPLY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION AND THUS DOES NOT WARRANT THE GRANTING OF A WRIT OF CERTIORARI; IN ANY EVENT, IT IS MERITLESS

In the instant case as to count I, petitioner was charged with the reckless possession of explosives in a private habitation in violation of California Penal Code section 12303.2. As to count I the court found petitioner guilty of possession of an explosive in violation of California Health and Safety Code section 12305 as a lesser included offense of the charge in count I.

Petitioner contends he was deprived of due process because he was convicted of violating California Health and Safety Code section 12305 and it is not a lesser included offense of the charge described in count I.

Initially, it must be noted this contention clearly does not warrant the granting of certiorari. It is well settled this Court will grant a petition for writ of certiorari only where a substantial federal question is involved. A substantial federal question involves a question which is special and important and beyond the academic or episodic. (Rice v. Sioux City Cemetery (1955) 349 U.S. 70; Supreme Court rule 19.)

Whether one California offense is a lesser included offense of another California offense is not a substantial federal question. Rather, it is an esoteric question of state law.

Accordingly, petitioner's first contention does not afford a basis for granting a petition for writ of certiorari. In any event, it should be noted petitioner was properly convicted of a lesser included offense of the offense charged and has no cause for complaint under federal or state law.

As noted earlier, petitioner was initially charged with reckless and malicious possession of destructive devices or explosives in violation of California Penal Code section 12303.2. That section reads as follows:

"Every person who recklessly or maliciously has in his possession any destructive device or any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or

near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of a felony, and shall be punishable by imprisonment in the state prison for a period of two, four, or six years."

Petitioner was actually convicted of unlawful possession of an explosive in violation of California Health and Safety Code section 12305. That provision reads as follows:

"Every person not in the lawful possession of an explosive in his possession is guilty of a felony."

Under California law, a trier of fact may properly convict a defendant of any offense charged in an information or indictment and any offense included within the charged offense. (Cal. Pen. Code, § 1159; In re Hess (1955) 45 Cal.2d 171, 174-175; In re Johnny V. (1978) 85 Cal.App.3d 120, 135-136.) Accordingly, the only question here is whether California Health and Safety Code section 12305 is a necessarily included offense of California Penal Code section 12303.2.

California Penal Code section 12303.2 proscribes the reckless or malicious possession of any destructive device or explosive by various public places or private habitation. California Health and Safety Code section 12305 provides every person in unlawful possession of any explosive is guilty of a felony.

Petitioner's contention here must fail as the Court of Appeal in People v.

Westoby (1976) 63 Cal.App.3d 790, 795-797, has held California Health and Safety Code section 12305 is a necessarily included offense of California Penal Code section 12303.2.

Petitioner apparently contends, however, that California Health and Safety Code section 12305 only deals with persons unlawfully acquiring explosives because they do not have a permit for explosives,² whereas California Penal Code section 12303.2 makes it illegal for persons lawfully in possession of explosives or destructive devices to use them in an unlawful manner. Accordingly, contends petitioner, one could lawfully possess explosives by having a permit for them, recklessly or maliciously use the explosives, and thereby violate section 12303.2. However, petitioner claims such conduct would not violate California Health and Safety Code section 12305 (as it only related to acquiring explosives without a permit). Section 12305 would thus not be included within section 12303.2, as section 12303.2 could be violated without violating section 12305. This argument is without merit.

Courts determine whether an offense is necessarily included within another offense by determining whether one offense can be committed without necessarily committing another offense. Where an offense

2. Petitioner's contention is somewhat confusing as he refers to California Health and Safety Code section 12303.2 at page 10 of the petition. The first reference to section 12303.2 probably should refer to California Health and Safety Code section 12305 as should the other two references.

cannot be committed without necessarily committing the other offense, the latter is a necessarily included offense. (People v. Anderson (1975) 15 Cal.3d 806, 809.)

Petitioner's argument here is premised on the belief California Health and Safety Code section 12305 only deals with persons who unlawfully come into possession of explosives and not persons who lawfully obtain the explosives but use the explosives in an unlawful manner. However, there is no reason to read section 12305 so narrowly. The plain meaning of the language of section 12305 is that it proscribes any unlawful possession of explosives. Thus, it proscribes unlawful acquisition of explosives and unlawful use of explosives lawfully acquired.

Petitioner suggests, however, that section 12305 of the California Health and Safety Code only deals with possession of explosives without a permit as it is in the same chapter of the California Health and Safety Code section 12303. Petitioner contends section 12303 indicates lawful possession of an explosive for purposes of the chapter containing sections 12303 and 12305 is possession with a permit. Thus the reference in section 12305 to unlawful possession is only to possession without a permit, not possession with a permit but improper use. This is simply not so.

California Health and Safety Code section 12303 reads as follows:

"'Lawful possession of an explosive,' as used in this chapter, means possessing

explosives in accordance with the stated purpose and conditions of a valid permit obtained pursuant to the provisions of this part, unless such person is specifically excepted from the permit requirements by the provisions of this part."

A reading of section 12303 indicates it does not mean any possession of an explosive with a permit is lawful and possession without a permit is unlawful. It refers to possession of explosives in accordance with the stated purpose and conditions of a valid permit. Thus, it is clear it indicates unlawful possession can occur under sections 12303 and 12305 where there is no permit or where a permit is obtained for explosives but the explosives are not maintained or used in accord with the permit.

Accordingly, California Health and Safety Code section 12305 does proscribe any unlawful possession of an explosive whether without a permit or with a permit.

Under these circumstances a violation of California Penal Code section 12303.2, involving unlawful use of explosives or destructive devices would of necessity include a violation of section 12305 which involves any unlawful possession. Moreover, since section 12305 proscribes any unlawful possession of explosives it would have to be included in any violation of California Penal Code section 12303.2 as a violation of section 12303.2 is unlawful and thus of necessity constitutes unlawful possession of explosives.

Accordingly, as every violation of California Penal Code section 12303.2 includes a violation of section 12305 of the California Health and Safety Code, section 12305 is included within section 12303.2. (People v. Anderson, supra, 15 Cal.3d 806; In re Hess, supra, 45 Cal.2d 171; People v. Westoby, supra, 63 Cal.App.3d 790.)^{3/}

Since California Health and Safety Code section 12305 is thus a lesser included offense of California Penal Code section 12303.2, petitioner's conviction here was proper. Thus, he has no cause for complaint.

II

THE FACT THAT CALIFORNIA
LAW PROHIBITS POSSESSION
OF TRACER BULLETS DOES NOT
CONSTITUTE A SUBSTANTIAL
FEDERAL QUESTION; AND, IN
ANY EVENT, CALIFORNIA MAY
PROPERLY PROHIBIT POSSESSION
OF TRACER BULLETS

Count II of the information charged petitioner with possession of a destructive device (Cal. Pen. Code, § 12303) and petitioner was convicted of possession of a destructive device. California Penal Code section 12301, subdivision (a)(1), defines a destructive device as "[a]ny projectile containing any explosive or incendiary material or

3. The esoteric interplay of these statutes clearly evidence why petitioner's contention does not raise a substantial federal question.

CONCLUSION

For the foregoing reasons respondent requests the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney
General--Criminal Division

DANIEL J. KREMER,
Assistant Attorney General

ALAN S. METH,
Deputy Attorney General


JAY M. BLOOM,
Deputy Attorney General

Attorneys for Respondent

APPENDIX A

CALIFORNIA STATUTES

Penal Code Sections

§ 1159.

The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

§ 1538.5

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior

§ 1538.5, subdivision (i), continued

to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

§ 12220.

Any person, firm, or corporation, who within this state sells, offers for sale, possesses or knowingly transports any firearms of the kind commonly known as a machine gun, except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the state prison or by a fine not to exceed five thousand dollars (\$5,000), or by both such fine and imprisonment.

§ 12301.

(a) The term "destructive device," as used in this chapter, shall include any of the following weapons:

(1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.

APPENDIX B

[Filed April 23, 1979]

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 9868
(Sup.Ct.No. CR-178)

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL E. STRINGER,

Defendant and Appellant.

APPEAL from the Superior Court of
San Bernardino County. Joseph A. Katz,
Judge. Affirmed.

Thomas Hunter Russell for Defendant
and Appellant.

Evelle J. Younger, Attorney General,
Karl J. Phaler and Jay M. Bloom, Deputy
Attorneys General, for Plaintiff and Respon-
dent.

THE COURT

Defendant was convicted of unlawful possession of explosives (Health & Saf. Code, § 12305) and possession of a destructive device (Pen. Code, § 12303) following a court trial, a jury trial having been waived. He is appealing from the judgment (order granting probation).

Defendant contends that (1) the court erred in denying his motion to quash the search warrant, (2) he was improperly convicted of unlawful possession of explosives (Health & Saf. Code, § 12305) because that crime is not a necessarily included offense within the crime with which he was charged, reckless possession of destructive devices in a private habitation (Pen. Code, § 12303.2), (3) the evidence is insufficient to show that he possessed the contraband, (4) the evidence is insufficient to show that the ammunition he possessed was a destructive device, and (5) Penal Code section 12303 is unconstitutional because it proscribes possession of tracer bullets.

FACTS

In June or July of 1976, Glenn Torres built a reinforced concrete workbench for defendant in the garage of defendant's residence in Wrightwood. Torres had performed odd jobs for defendant on prior occasions. The workbench had two hollow cavities that were four feet long, four feet wide and four feet deep. Torres testified that defendant had a military half-track parked in his garage.

Several days after completing the bench, Torres returned to defendant's residence. As Torres walked toward the garage, he observed defendant and several other persons involved in clandestine activities in the garage. Defendant, who appeared nervous, quickly met Torres and escorted him to the house.

In defendant's living room, Torres observed a number of pillow cases that contained 20 to 25 carbines, including burp guns, and automatics; ammunition; and a number of pineapple-type military hand grenades. He also saw what appeared to be magazines and banana clips (ammunition). On three occasions defendant entered the living room and carried the pillow cases and weapons to the garage.

Defendant habitually wore military clothes and drove military vehicles with military stars and numbers on them. Once when Torres remarked to defendant that he had everything but a .50 caliber machine gun on top of the half-track, defendant replied that he had that more or less squared away.

On December 11, 1976, San Bernardino County Deputy Sheriff Charles Wideen went to Lone Pine Canyon and observed a recoilless rifle, a mortar, a bazooka, parts of 30 and 50 caliber machine guns, over 10,000 rounds of ammunition, explosive devices, metal drums, booby trap devices, explosives, an anti-tank gun and military manuals about guerrilla warfare, survival and weaponry. It appeared that these items had only been in the canyon several days. The area around defendant's house was sparsely

populated and this cache of weapons was found along the road that led to defendant's residence, which was located six miles away.

When San Bernardino County Deputy Sheriff Patrick Dailey showed Torres some of the weapons found in Lone Pine Canyon, Torres stated that they were similar to some of the weapons he had previously seen at defendant's residence. Carpeting found in the canyon matched the carpeting in defendant's residence.

Deputy Dailey also testified that other persons had also seen weapons at defendant's residence and defendant had approached an individual in attempt to sell a gun.

On the basis of this information, a search warrant was issued for defendant's residence, including his garage, and two of his military vehicles on December 14, 1976. When the search warrant was executed, a large amount of weapons and ammunition, including tracer ammunition and a 50-pound bag of a blasting agent known as Hercules nitro carbo nitrate and two coils each of safety fuse and detonating coil were seized.

VALIDITY OF SEARCH WARRANT

Initially, defendant contends that the lower court erred in denying his motion to quash the search warrant and suppress the evidence seized when the search warrant was executed because (1) the information presented to the magistrate was stale, (2) Torres' testimony as to what he observed in July 1976 was mere speculation and (3) the proceedings before the magistrate were defective because the parties went off the record on four separate occasions.

The search warrant was issued based upon testimony presented under oath to the magistrate by the affiant, Deputy Dailey, on December 13 and 14, 1976. He related the citizen informant's statements to him concerning his observations when he had been at defendant's residence.

Defendant argues that the information provided by the citizen informant, Torres, concerning his observations at defendant's residence in June or July was stale and did not provide probable cause to believe weapons would be found on the premises in December when the search warrant issued.

Affidavits for search warrants must be tested and interpreted in a common sense manner so as not to discourage police officers from seeking search warrants before acting and the resolution of doubtful and marginal cases should be largely determined by the preference to be accorded to warrants. (People v. Mesa, 14 Cal.3d 466, 469.)

While the weapons and ammunition had been observed by Torres at defendant's residence half a year prior to issuance of the search warrant, there was other testimony presented that provided sufficient probable cause to believe that contraband was currently located in the residence. The large cache of arms and ammunition was discovered in a canyon off a road that led to defendant's residence in a sparsely populated area six miles away three days before the issuance of the warrant. The arms and ammunition, which had only been in the canyon several days, appeared similar to the arms and ammunition that Torres had seen at defendant's residence the prior

summer. Carpeting found with the weapons in the canyon matched carpeting in defendant's residence. Based on all the information presented in support of the issuance of the search warrant, it was reasonable for the magistrate to conclude there would still be weapons and arms at defendant's residence.

While defendant argues that Torres' statements concerning his observations at defendant's residence were mere speculation and conjecture, a close examination of the record before us reveals that there is no merit in this argument. Torres, who had served in the military and thus was familiar with items of this nature, stated he saw gunstocks, pineapple-type hand grenades, the outline of burp guns, square ammunition boxes and other similar items. There was nothing speculative about these observations.

Defendant also argues that the proceedings before the magistrate pursuant to Penal Code section 1526, subdivision (b), were defective because these proceedings went off the record on four different occasions. There is no merit in this argument. The deputy district attorney present when the oral testimony was heard by the magistrate stated in an affidavit considered by the lower court that all of the off the record conversations related only to the format of the testimony being adduced and not to matters affecting probable cause.

Consequently, the lower court did not err when it denied defendant's Penal Code section 1538.5 motion to quash the search warrant and suppress evidence seized when the search warrant was executed.

NECESSARILY INCLUDED OFFENSE

In count I of the information, defendant was charged with reckless possession of explosives in a private habitation in violation of Penal Code section 12303.2. Defendant contends the court erred when it found him guilty of unlawful possession of explosives in violation of Health and Safety Code section 12305 because the latter offense is not necessarily included within the former.

A defendant may be convicted of any offense charged in an information and any offense included within the charged offense. It has been held that possession of explosives (Health & Saf. Code, § 12305) is a lesser and necessarily included offense within the offense of reckless possession of explosives in a private habitation (Pen. Code, § 12303.2). (People v. Westoby, 63 Cal.App.3d 790, 795.)

We can find no merit in defendant's argument that Health and Safety Code section 12305 is not a lesser and necessarily included offense because it only proscribes unlawful acquisition while Penal Code section 12303.2 proscribes all use of explosives in an unlawful manner. A plain reading of Health and Safety Code section 12305 indicates that it proscribes any unlawful possession of explosives, including unlawful acquisition and unlawful use, and thus one cannot violate Penal Code section 12303.2 without violating Health and Safety Code section 12305.

We need not concern ourselves with defendant's further arguments as to whether a defendant can be charged with both offenses

and whether a conviction of one bars a conviction of the other since they are not a test of whether one offense is included within the other offense but, rather, are rules which apply after it is determined one offense is included within another offense.

SUFFICIENCY OF THE EVIDENCE
OF POSSESSION

Defendant contends that there was insufficient evidence to show that he possessed the contraband that was seized when the search warrant was executed at the residence in Wrightwood.

"An appellate court must view the evidence in a light most favorable to respondent, presuming in support of the judgment the existence of every fact which can reasonably be deduced from the evidence." (People v. Strickland, 11 Cal.3d 946, 952.)

We have examined the record on appeal and conclude that there was ample evidence that defendant possessed the contraband. Defendant hired Torres to construct a workbench in the garage. Torres saw defendant at the residence on almost all of the 30 occasions when he was at the residence. Written documents admitted into evidence indicated defendant owned the residence. Moreover, there was no evidence that any other person had access to the contraband.

SUFFICIENCY OF EVIDENCE OF A
DESTRUCTIVE DEVICE

Defendant contends that the evidence is insufficient to show that the

ammunition used to support his conviction for possession of a destructive device (Pen. Code, § 12303) contained any explosive or incendiary material.

Penal Code section 12301, subdivision (a)(1) defines destructive device as "[a]ny projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, . . ."

When viewed in the light most favorable to the judgment, as required by the usual rules governing appellate review, the evidence presented at trial is more than sufficient to show that the ammunition was tracer ammunition. The ammunition was test fired on July 13, 1977, and two witnesses testified on the basis of their observations and their expertise that the ammunition was tracer ammunition.

*CONSTITUTIONALITY OF PENAL CODE
SECTION 12303

Finally, defendant contends that the proscription of possession of tracer ammunition in Penal Code section 12303 is unconstitutional as an unreasonable exercise of legislative power. He argues that there is no valid or legitimate public interest served by banning the possession of tracer ammunition.

"In the exercise of its police power, each state has the right to enact laws to promote public health, safety, morals and welfare." (People v. Drolet, 30 Cal.App.3d 207, 211.) Moreover, the validity of these legislative enactments

will not be questioned unless their unconstitutionality clearly positively, and unmistakably appears. (People v. Wingo, 14 Cal.3d 169, 174.)

Penal statutes proscribing the possession of tracer bullets are a legitimate and proper exercise of the police power. The Legislature could reasonably conclude that the incendiary components of tracer bullets make them more dangerous to the public health and safety than regular bullets, and that there is no legitimate need for civilians to possess and use these incendiary bullets.

The judgment (order granting probation) is affirmed.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

~~JUN 27 1974~~

I have this day filed Order_____

HEARING DENIED

In re: 4 Crim. No. 9868

People

vs.

Stringer

Respectfully,

G. E. BISHEL
Clerk